STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DEARBORN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, METROMEDIA FIBER NETWORK SERVICES, INC, COMPETITIVE LOCAL EXCHANGE CARRIERS ASSOCIATION OF MICHIGAN, and TELECOMMUNICATIONS ASSOCIATION OF MICHIGAN,

Appellees,

and

SBC AMERITECH MICHIGAN,

Amicus Curiae.

UNPUBLISHED
March 30, 2004

No. 236722
PSC
LC No. 00-012797

Before: Bandstra, P.J. and Gage and Schuette, JJ.

PER CURIAM.

The City of Dearborn appeals as of right the order of the Public Service Commission granting relief to Metromedia Fiber Network Services (MFN), based on findings that the city was in violation of the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*[1] We affirm.

MFN sought to build a fiber optic network in southeast Michigan, and on March 30, 2000, it applied for a permit to access and use public rights-of-way in the City of Dearborn, pursuant to MCL 484.2251. The city notified MFN that the city telecommunications ordinance

[1] Article 2A of the MTA, MCL 484.2251-484.2254, was repealed in 2002, and a new act with significantly different requirements, the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, MCL 484.3101, *et seq.*, took effect on November 1, 2002.

required MFN to obtain a franchise from the city. Although MFN informed the city that it sought a permit under the MTA, and not a franchise, the city insisted on its right to enforce its telecommunications ordinance.

MFN filed a four-count complaint with the PSC, asserting that the city violated the MTA by failing to grant or deny access to the public rights-of-way within ninety days, applying its telecommunications ordinance in a manner that violated the act, seeking to impose franchise terms that violated the act, and imposing discriminatory access fees. The PSC found that the city violated the MTA on all four grounds, and ordered it to cease and desist from further violations. It awarded MFN attorney fees and costs incurred in connection with the case, and ordered the city to pay a fine from the date of the issuance of the order through the day of issuance of a permit or the lawful denial of the request for a permit. The fine was $2,000 per day for the first ten days, and $4,000 per day thereafter.

Appellate review of PSC orders is narrow in scope. All rates, fares, regulations, practices and services prescribed by the PSC are deemed prima facie to be lawful and reasonable. MCL 462.25. The party attacking an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of the law and it is unreasonable when it is unsupported by the evidence. *Ass'n of Businesses Advocating Tariff Equity v Pub Service Comm*, 219 Mich App 653, 659; 557 NW2d 918 (1996). "To the extent that the decision is based on findings of fact, the challenger must show that those findings are not supported by competent, material, and substantial evidence on the whole record." *Id.* This Court gives due deference to the administrative expertise of the PSC, and will not substitute its judgment for that of the agency. *Id.*

Section 251 of the MTA, MCL 484.2251, stated:

> (1) Except as provided in subsections (2) and (3), a local unit of government shall grant a permit for access to and the ongoing use of all right-of-ways, easements, and public places under its control and jurisdiction to providers of telecommunication services.
>
> (2) This section shall not limit a local unit of government's right to review and approve a provider's access to and ongoing use of a right-of-way, easement, or public place or limit the unit's authority to ensure and protect the health, safety, and welfare of the public.
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> (3) A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place. A provider's right to access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government. A local unit of government may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost, to ensure that the right-of-way, easement, or public place is returned to its original condition during and after the provider's access and use.

The city argues that the PSC erred when it found that the city violated these provisions where MFN did not complete the franchise requirements necessary for consideration of its permit application. However, the record shows that MFN specifically applied for a permit under the MTA, it never withdrew its application, and the city neither granted nor denied the application. Because, as discussed below, the franchise ordinance contains additional requirements that are specifically excluded from consideration in the permit process, a franchise cannot replace the permit required by the MTA. The PSC did not err in finding that the city violated MCL 484.2251(3).

The city asserts that the PSC erred in applying the statute because MFN was not a telecommunications provider subject to the statute. The MTA defines telecommunications services as including "regulated and unregulated services offered to customers for the transmission of 2-way interactive communication and associated usage. A telecommunication service is not a public utility service." MCL 484.2102(dd). A telecommunications provider is "a person or an affiliate of the person each of which for compensation provides 1 or more telecommunication services." MCL 484.2102(cc). MFN presented evidence that it sought to provide telecommunications services. The PSC found that the services offered by MFN were sufficient to confer status as a telecommunications provider under the MTA. We defer to the agency's expertise in construing the statute it is charged with administering. *Adrian School Dist v Michigan School Employees' Retirement Sys*, 458 Mich 326, 336; 582 NW2d 767 (1998). There was competent, material, and substantial evidence to support the finding.

The city argues that the PSC erred in finding that the franchise provisions of the city's telecommunications ordinance and the amount of fees required under that provision were in violation of the MTA. MCL 484.2252 provided:

> Any conditions of a permit granted under section 251 shall be limited to the provider's access and usage of any right-of-way, easement, or public place.

MCL 484.2253 provided:

> Any fees or assessments made under section 251 shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider.

Const 1963, art 7, § 29 provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

In *TCG Detroit v City of Dearborn*, ___ Mich App ___; ___ NW2d ___ (2004), a panel of this Court reviewed the constitutionality of these sections of the MTA and reviewed the determination of "fixed and variable costs" under the statute. The Court noted that Const 1963, art 7, § 29 has three clauses concerning three different powers. The first clause states that public utilities cannot use the rights-of-way of local units of government without consent; the second clause forbids a utility from conducting local business without first obtaining a franchise; and the third clause declares that local units of government retain the right of reasonable control over their highways, streets, alleys and public places. A review of the case law showed that a city has the implied power to contract for rates to be charged consumers as a condition of granting consent to the use of its rights-of-way, but that implied power must give way to the state's legislative power to set rates when the state exercises that power. Where the Legislature has occupied the field, a city retains only such power as is strictly referable to the reasonable control of its streets, which does not include the power to prohibit the activity. If the city charges a fee, that fee must be based on the expense to the city of issuing a license and of supervising the activity. Where the consent of the city is required, that consent cannot be refused arbitrarily or unreasonably.

The issue framed by the city in *TCG Detroit* was whether the state can constitutionally limit a city's rights under the Constitution by limiting the amount of money it could charge as a condition of consent to use the rights-of-way. The Constitution expressly grants the right to give or withhold consent; the right to set fees is permissive and implied. The Legislature can set fees as long as it does not impermissibly infringe on the right to grant or withhold consent. We agree that the fee restrictions imposed by the MTA do not violate Const 1963 art 7, § 29.

The city argues that there is no evidence supporting the PSC finding that the city's fee was excessive. The evidence offered by the city in this case was similar to the evidence presented in the circuit court in *TCG Detroit*. The evidence, which concerned the city's total costs in maintaining its rights-of-way, was properly rejected because it did not fall within the requirements of § 253. The PSC was not asked to determine the amount of the fee that would be appropriate. It only determined that the fee proposed by the city did not comply with the statute. As in the *TCG Detroit* case, there was ample evidence to support that finding.

The PSC did not err in finding that the city's non-financial franchise requirements were in violation of § 252. Among other conditions, the franchise agreement required the applicant to continually incorporate new technical developments into the system to reflect the state of the art, to provide service to the city at the lowest rate charged to any commercial customer in the area, to provide fiber and cable to the city at no cost, to make its facilities available to the city at no cost during a time of urgent community need, and to develop preventative maintenance and customer service policies. These provisions seek to regulate matters that are not related to the use of the rights-of-way, and the PSC did not err in finding that the city placed improper conditions on the issuance of a lawful permit.

The city argues that the PSC lacked jurisdiction to impose a fine on a governmental entity. The PSC is a creature of the Legislature, and possesses only the authority granted by statutory enactments. *Union Carbide Corp v Pub Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1998). MCL 484.2201 provides:

(1) The Michigan public service commission shall have jurisdiction and authority to administer this act.

(2) In administering this act, the commission shall be limited to the powers and duties prescribed by this act.

MCL 484.2601 provides:

> If after notice and hearing the commission finds a person has violated this act, the commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following:
>
> (a) Except as provided in subdivision (b), the person to pay a fine for the first offense of not less than $1,000.00 nor more than $20,000.00 per day that the person is in violation of this act, and for each subsequent offense, a fine of not less than $2,000.00 nor more than $40,000.00 per day.
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> (b) If the provider has less than 250,000 access lines, the provider to pay a fine for the first offense of not less than $200.00 or more than $500.00 per day that the provider is in violation of this act, and for each subsequent offense a fine of not less than $500.00 or more than $1,000.00 per day.
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> (c) A refund to the ratepayers of the provider of any collected excessive rates.
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> (d) If the person is a licensee under this act, that the person's license is revoked.
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> (e) Cease and desist orders.
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> (f) Except for an arbitration case under section 252 or Part II of title II of the communications act or 1934, chapter 622, 110 Stat. 66, attorney fees and actual costs of a person or a provider of less than 250,000 end-users.

The statute defines a person as "an individual, corporation, partnership, association, governmental entity, or any other legal entity." MCL 484.2102(v). The Court is bound by the statutory definition. *Vargo v Sauer*, 457 Mich 49, 58; 576 NW2d 656 (1998). The Legislature elected to apply the penalty provision to all persons, including governmental entities, who violate the act. The fine imposed began on the date that the PSC issued its order, and continued only until the city issued MFN a permit or denied the application for a lawful reason. The fine was reasonable and was prospective. The regulatory statute does not impose tort liability, and there is no support for the city's assertion of governmental immunity. The award of attorney fees was authorized by statute and compensated MFN for its costs in bringing this action. The city has failed to show that the order of the PSC is unlawful or unreasonable.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette